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No. 95-1844

IN THE

Supreme Court of the United States

October Term, 1996

AMERICAN BANKERS MORTGAGE CORPORATION,

Petitioner,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Respondent.

THE MORTGAGE NETWORK, INC., MORTGAGE NETWORK SERVICING PARTNERS, MORTGAGE NETWORK SERVICING PARTNERS II, AND ROBERT LAMB,

Petitioners,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Federal Home Loan Mortgage Corporation ("Freddie Mac") opposes the petition of American Bankers Mortgage Corporation ("ABM"), The Mortgage Network, Inc. ("TMNI") and others (collectively, "Petitioners") to this Court to issue a Writ of Certiorari to review two judgments of the

United States Court of Appeals for the Ninth Circuit[1] upholding the dismissal upon summary judgment of actions brought by ABM and TMNI. Contrary to Petitioners' allegations of error, the Ninth Circuit correctly stated and applied the rule of law as set forth in *Lebron v. National R.R. Passenger Corp.*, ____ U.S. ____, 115 S. Ct. 196 (1995), in finding that Freddie Mac was not a government entity for purposes of the Fifth Amendment. Similarly, there is no conflict between the Circuits as asserted by Petitioners. *T.I. Fed. Credit Union v. Delbonis*, 72 F.3d 921 (1st Cir. 1995) (decided over a month prior to the Ninth Circuit decisions), turns on the applicability of a discreet provision of the bankruptcy code to a federal credit union and has no bearing on the question of Constitutional application described below. Further, even if the *Delbonis* analysis were relevant, it presents no conflict with the Ninth Circuit's holdings in the *TMNI* and *ABM* cases. Because the Ninth Circuit stated and applied the proper rule of law, and because there is no conflict between the Ninth and First Circuits, the Petition for Writ of Certiorari should be denied.

SINGLE PETITION FOR TWO JUDGMENTS

The correct citation for a single Petition for Writ of Certiorari to review two judgments is Rule 12.4, Rules of the United States Supreme Court.

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[1] The decisions, each dated February 12, 1996, are: *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, No. 94-55967 and *Mortgage Network, Inc. v. Federal Home Loan Mortgage Corp.*, No. 94-55996. Although the petition lists Robert Lamb, Mortgage Network Servicing Partners ("Partners") and Mortgage Network Servicing Partners II ("Partners II") as petitioners, as discussed at n.4 below, none of these putative parties has standing to press the appeal of the Constitutional claims with respect to which Certiorari is requested.

STATEMENT OF THE CASES

As set forth below, the *ABM* and *TMNI* cases arose out of two sets of separate and unrelated facts.[2] The one common thread is that Freddie Mac ultimately exercised its contractual right to terminate its business relationship with each company after discovery of ABM's and TMNI's distinct contractual breaches.

Freddie Mac is a federally chartered, for-profit corporation which purchases home mortgages, "packages" the mortgages into securities on which it guarantees payment of principal and interest, and then sells those securities in the capital markets. *See* Petition at 2a. Freddie Mac profits from the fees it charges for guaranteeing the securities and uses the proceeds from the sale of the securities to purchase additional mortgages. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")[3] gave Freddie Mac private ownership, 12 U.S.C. § 1453(a) (1989) (approximately 60 million shares of common stock are publicly traded on the New York Stock Exchange), gave it a privately controlled board of directors (13 of 18 members are elected annually by the shareholders), 12 U.S.C. § 1452(a)(2)(A) (1989), and made clear that Freddie Mac's employees are not government employees for any purpose, *see e.g.*, 12 U.S.C. § 1457 (1989).

Freddie Mac purchases mortgages only from lenders who have been approved as Freddie Mac "seller/servicers." The seller/servicer receives payment when it sells a loan to Freddie Mac and is subsequently paid a monthly servicing fee to

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[2] In their Petition for Writ of Certiorari, ABM & TMNI allege numerous "facts" which are unsupported by either the record below or reality. In order to abide by the direction of the Court for brevity in this Opposition, Freddie Mac will not respond to all of Petitioners' many misrepresentations and inaccuracies.

[3] FIRREA, Pub. L. No. 101-73 (§ 731, 103 Stat. 183, 429 (1989) (codified at 12 U.S.C. ⇜ 1451-59).

administer the mortgage for Freddie Mac. The relationship between Freddie Mac and its seller/servicers is governed by a contract consisting of the Freddie Mac Sellers' & Servicers' Guide (the "Guide") and other "Purchase Documents," as that term is defined in the Guide. Petition at 2a.

The Guide sets out, among other things, the required standards and procedures for the origination and servicing of Freddie Mac loans, including proper underwriting, quality control and fund accounting. With each mortgage sold to Freddie Mac, the seller/servicer warrants and represents to Freddie Mac that it is in compliance with the terms of the Guide, that its origination and servicing of Freddie Mac loans conform to the standards and requirements set forth in the Guide, and that:

a. All information reported to Freddie Mac is true, complete, and accurate;

b. The terms, conditions and requirements stated in the purchase documents have been fully satisfied;

c. All warranties and representations made by the seller/servicer are true and correct;

d. The seller/servicer is in compliance with its agreements contained in the Purchase Documents;

e. Each mortgage is of "investment quality" as defined by the Guide;

f. The seller/servicer has not misstated or omitted any material facts in the documents submitted to Freddie Mac; and

g. Reconciled and accurate accounting records will be submitted to Freddie Mac.

The seller/servicer agrees that, if the warranties or representations to Freddie Mac are breached by the seller/servicer, Freddie Mac may, in its discretion, terminate the seller/servicer relationship. Both ABM and TMNI were Freddie Mac

seller/servicers.[4] There is no dispute that, as discussed *infra*, both ABM and TMNI breached their contractual obligations to Freddie Mac.

A. ABM: STATEMENT OF FACTS

In December 1991, an audit of ABM's financial records conducted by its outside accountant uncovered several violations of the Guide, including gross underreporting by ABM of delinquencies on the mortgages it sold to, and serviced for, Freddie Mac.[5] While ABM tried to explain this underreporting as the product of confusion regarding the Guide's definition of 30-day delinquencies, ABM's outside auditor noted that even "[u]sing a definition of '60 days unpaid'; 98 [rather than only 20] delinquent loans should have been reported." Petition at 3a.

ABM's accountants insisted on revealing this misreporting of delinquencies in their audit opinion letter. Thus, ABM's auditors reported: "[a]s discussed in Note 5 to the financial statements, the company did not correctly calculate and report the loan delinquencies to its principal investor, which allows the investor to take possible punitive actions." In Note 5, the auditors explained Freddie Mac's options: "The actions could range from a verbal or written warning to the company, to FHLMC disqualifying the company as an

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[4] In the complaints in the District Court, the only parties in those actions asserting due process claims against Freddie Mac were ABM and TMNI, respectively. The asserted basis for the Constitutional claims was Freddie Mac's alleged failure to accord due process in exercising its contractual right of termination. Neither Partners, Partners II nor Lamb was a party to any contract with Freddie Mac. Thus, they cannot assert standing before this Court to pursue a Fifth Amendment claim ostensibly grounded in the termination of the contractual relationships at issue.

[5] ABM later admitted to Freddie Mac that the difference between delinquencies it reported to Freddie Mac and actual delinquencies, in one quarter alone, was: (1) 20 reported vs. 233 actual in October 1991; (2) 29 reported vs. 273 actual in November 1991; and (3) 41 reported vs. 288 actual in December 1991.

approved mortgage servicer for them. Should FHLMC decide to remove the servicing, it could do so with no compensation to the company and require the company to pay all associated costs."

ABM's outside accountants also noted that the custodial bank account maintained by ABM for Freddie Mac contained improperly commingled funds. The report noted that, under the Guide, only principal and interest payments on Freddie Mac loans could be deposited or held in a principal and interest custodial account. Nonetheless, ABM mixed other funds into this account to cover principal and interest fees that should have been received from delinquent mortgages. The report also found that impound funds were improperly moved between the principal and interest custodial account and a separate escrow custodial account in violation of the Guide.

After learning of ABM's misrepresentations regarding delinquencies and its prohibited commingling of money, Freddie Mac terminated ABM's eligibility as a Freddie Mac seller/servicer. Petition at 3a. In its written contractual appeal to Freddie Mac, ABM admitted many of the violations cited by Freddie Mac. ABM further acknowledged its misrepresenting of delinquencies, its lack of qualified staff, its failure to perform certain property inspections, its failure to maintain properly documented mortgage files and that its practice of commingling ABM funds in accounts held in trust for Freddie Mac "was not permitted by the Guide." Accordingly, Freddie Mac denied ABM's appeal.

Upon termination, ABM was obligated to deliver to Freddie Mac all documents related to the Freddie Mac mortgages, and was no longer entitled to receive any servicing fees, income or payment for the portfolio. Approximately $1,269,963.46 was owed by ABM to Freddie Mac as of June 1992 for missing payoffs, short escrow accounts and unremitted monthly payments. No portion of this amount has ever been paid to Freddie Mac by ABM. Petition at 4a.

B. TMNI: STATEMENT OF FACTS

In June 1992, after conducting an audit of TMNI's operations, Freddie Mac learned that the portfolio of mortgages serviced by TMNI for Freddie Mac was rife with loan fraud, and that TMNI had severe deficiencies in its origination, underwriting and quality control practices. Indeed, Freddie Mac learned that virtually every TMNI branch office was involved in creating fraudulent loan documents to make loans to unqualified borrowers.

In addition, Freddie Mac learned from former TMNI staff and independent third parties[6] that TMNI management, underwriting and quality control personnel were aware of and willingly facilitated the origination of fraudulent loans for sale to Freddie Mac. Freddie Mac further learned that the loans serviced by TMNI suffered from a delinquency rate so high that it violated the terms of TMNI's contract with Freddie Mac.

Based on the results of its audit, Freddie Mac exercised its contractual rights under the Guide, terminated its contract with TMNI, and retrieved Freddie Mac's mortgage files. Petition at 28a. Freddie Mac's subsequent investigation further confirmed the existence of widespread fraud in the loans originated by TMNI, as well as the facilitation of the fraud by TMNI management, quality control, and underwriting personnel. For example, TMNI's former quality control officer admitted in her deposition that she was aware of fraudulent documents, but that TMNI concealed the fraud. After several extensions, TMNI filed an appeal of Freddie Mac's termination decision, which was denied by Freddie Mac in light of

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[6] For example, the former Regional Vice President of TMNI admitted under oath that he personally prepared fraudulent documents for loans originated by TMNI. In addition, TMNI's former Chief Operating Officer testified that he suspected the use of fraudulent loan documentation at TMNI and a tax preparer stated under oath that tax returns allegedly prepared by his office were forgeries.

the overwhelming evidence of fraud. As with ABM, TMNI was obligated to deliver to Freddie Mac all documents related to the Freddie Mac mortgages, and was no longer entitled to receive any servicing fees, income or payment for the portfolio. *Id.* TMNI failed to return many of the mortgage documents to Freddie Mac, causing Freddie Mac to incur substantial damages. In addition, TMNI was required to repurchase the fraudulent mortgages from Freddie Mac, but failed to do so, causing Freddie Mac a total of $1,794,667.34 in losses, none of which has been paid by TMNI.

STANDARD FOR REVIEW

The basis upon which certiorari will be granted is set forth in Rule 10 of the Rules of the Supreme Court of the United States. The Rule provides that certiorari is a matter for the Court's discretion, and will be granted "only for compelling reasons." Rule 10 further states that a petition "is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Petitioners argue that certiorari should be granted on the grounds that the Ninth Circuit misapplied the Supreme Court's holding in *Lebron*, and that a conflict exists between the *TMNI/ABM* decisions and the First Circuit's holding in *Delbonis*. Neither of the foregoing assertions is true. The Ninth Circuit properly stated and applied *Lebron*, and no conflict exists between *Delbonis* and the decisions below. Thus, there is no reason, let alone a compelling one, to grant certiorari in this matter and the Petition should be denied.

ARGUMENT

A. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISION IN LEBRON.

In *Lebron*, an artist sought to rent billboard space in New York's Pennsylvania Station under a contract which allowed the station's owner, the National Railroad Passenger Corporation ("Amtrak"), the right to approve the advertising copy to

be displayed. *See* 115 S. Ct. at 963-64. After reviewing the proposed advertisement, Amtrak refused to permit its display on the grounds that Amtrak's standing policy precluded the use of the billboard in question for political advertising. The artist filed suit, alleging that, in refusing to run the advertisement, Amtrak had violated his rights under the First and Fifth Amendments to the Constitution. *Id.* at 964.

Upon review, this Court held that Amtrak is a government actor for purposes of the First Amendment, and identified specific criteria to be examined in determining whether a government-created corporation should be deemed a part of the government for First Amendment purposes:

> Where . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself the permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purpose of the First Amendment.

Id. at 974-75.

Applying the foregoing test to Amtrak, the Court found that, because Amtrak was "created by a special statute explicitly for the furtherance of governmental goals" and because the federal government maintained permanent control over Amtrak's actions through its appointment of a majority of Amtrak's board of directors, Amtrak should be considered part of the federal government for First Amendment purposes. *Id.* at 973-74.

In the *ABM* and *TMNI* decisions, the Ninth Circuit examined the structure and operations of Freddie Mac and correctly concluded that Freddie Mac is not a part of the federal government under the test articulated in *Lebron*. *See American Bankers Mortgage Corp. v. Federal Home Loan Mort-*

gage Corp., 75 F.3d 1401, 1406-09 (9th Cir. 1996).[7] The Ninth Circuit found that, unlike Amtrak, where the government appointed the entirety of its nine board members, only five of Freddie Mac's eighteen board members are governmental appointees, with the majority elected by Freddie Mac's private shareholders. *Id.* at 1407;[8] 115 S. Ct. at 967-68. Similarly, while Freddie Mac has issued nearly 60 million shares of stock, all of which is publicly traded on the New York Stock Exchange, Amtrak had only four private shareholders, none of whom had the right to elect any board members. *See* 115 S. Ct. at 968; *compare* 12 U.S.C. § 1452 (a)(2) (1989) and 75 F.3d at 1407.

The Ninth Circuit followed the reasoning of the Supreme Court and compared Freddie Mac to the Communications Satellite Corporation ("Comsat"), another corporation created by federal statute. This Court had found Comsat to be "genuinely private and not Government controlled" based upon the presence of a privately-elected majority on its board of directors. *See* 115 S. Ct. at 970, 973.[9] The Ninth Circuit noted that, like Comsat, Freddie Mac is controlled by its private shareholders, and accordingly held that "the second element of the *Lebron* test for determining whether a federally chartered corporation is a federal entity, the government's control over the corporation, is missing in this case." 75 F.3d at 1408.

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[7] The ABM and TMNI cases were argued consecutively to the Ninth Circuit as related appeals. The Court addressed the identical constitutional arguments raised by ABM and TMNI in its decision. This portion of the ABM decision is incorporated by reference into the TMNI opinion. *Mortgage Network, Inc. v. Federal Home Loan Mortgage Corp.*, No. 94-55996 at 2 (9th Cir. 1996)(Petition at 27a.).

[8] The government has no authority under Freddie Mac's charter to appoint any additional board members. *See* 12 U.S.C. § 1452(a)(2) (1989).

[9] Like Freddie Mac, Comsat's stock is traded on the New York Stock Exchange.

Petitioners contend that the Ninth Circuit misconstrued *Lebron* by holding that "requisite control by the Federal Government can only be demonstrated by a showing that the President of the United States appoints a majority of the Board of Directors, and cannot be demonstrated by a showing of the regulation of [FHLMC] by Federal Law . . .." Petition at 13. This contention is utterly unsupported by the text of the decision below. It is evident from even a cursory review of the Ninth Circuit's opinion that it does not hold that *Lebron* constitutes the exclusive test for government action. To the contrary, it is readily apparent that the Ninth Circuit applied the full panoply of theories under which Freddie Mac might be found subject to Constitutional mandate, including whether the purported "regulation" of Freddie Mac under its governing legislation could serve as a basis to attribute the challenged termination actions to the government. After careful analysis, the Court determined that Freddie Mac's actions were purely private in nature. *See* 75 F.3d at 1407-11.

Moreover, Petitioners' allegation of error is grounded in a gross misreading of this Court's opinion in *Lebron*. Petitioners erroneously assert that, under *Lebron*, Freddie Mac should be deemed part of the government notwithstanding its private ownership and governance based upon the "regulation" of Freddie Mac under its charter. *See* Petition at 15-16. Petitioners' wishful argument is without support anywhere in *Lebron*. The text Petitioners cite as the basis for their contention merely provides that Conrail does not constitute a part of the government, even though a majority of its board consists of presidential appointees, because the power to appoint is only temporary and the purpose of the appointments is other than "governmental" in nature. *See* 115 S. Ct. at 974 (holding that, even though 8 of 15 board members were governmentally-appointed, Conrail was private because the appointed directors' purpose was to operate Conrail at a profit, and voting control would shift back to the shareholders after sufficient reduction in the debt owed the United States).

Petitioners' argument also flies in the face of a long line of Supreme Court precedent holding that governmental regulation cannot transform a private entity into part of the government subject to Constitutional requirements. *See San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government."); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("[T]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State" for Constitutional purposes) *(quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 359 (1974)); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (extensive regulation of private school did not make its actions attributable to the state); *Jackson*, 419 U.S. 345, 350 (actions of a public utility subject to "extensive state regulation" were not actions of the state).

As this Court has repeatedly held, in order for regulation to be the basis of a finding of governmental action, there must be a showing that the challenged action was somehow compelled by the regulation in question. *See, e.g., San Francisco Arts*, 483 U.S. at 546 ("Most fundamentally, this Court has held that a government 'normally can be responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the [government].' "), (*quoting Blum*, 457 U.S. at 1004); *Blum*, 457 U.S. at 1004 ("The complaining party must . . . show that 'there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.' ") (*quoting Jackson*, 419 U.S. at 351.).

In the cases below, the Circuit Court specifically applied the foregoing principles to Freddie Mac and the challenged termination actions involving TMNI and ABM and properly concluded that there was simply no correlation between any

purported "regulation" of Freddie Mac and the termination actions at issue. *See* 75 F.3d at 1408-10, especially 1410 ("The regulations regarding Freddie Mac appear substantially less 'extensive and detailed' than those typically imposed on public utilities. More importantly, ABM has failed to allege any nexus between those regulations and the challenged actions by Freddie Mac, *i.e.*, the termination of ABM as a seller/servicer."). Thus, there is no basis to Petitioners' allegation that the Ninth Circuit erred in its application of *Lebron*.

B. THERE IS NO CONFLICT BETWEEN THE ABM/TMNI OPINION AND THE FIRST CIRCUIT'S DECISION IN DELBONIS.

Relying upon their misreading of the Ninth Circuit's decisions in *ABM/TMNI*, the petitioners also contend that the *ABM/TMNI* opinions are in conflict with the First Circuit's holding in *Delbonis*. *See* Petition at 26. This alleged "conflict" is pure chimera, devoid of any support outside of Petitioners' collective imagination.

As discussed in Section A, above, the alleged "holding" in *ABM/TMNI* upon which petitioners seek to ground their claim of conflict does not exist. In addition, *Delbonis* is limited to a question of statutory interpretation of the Bankruptcy Code with regard to a credit union and is thus patently inapposite to the applicability of Constitutional mandate to Freddie Mac.

In *Delbonis*, a federal credit union sought a declaration in Chapter 7 proceedings that the debtor's student loan debt was nondischargeable under the terms of 11 U.S.C. § 523 (a)(8), which exempts from discharge, among other things, educational loans "made, insured, or guaranteed by a governmental unit or nonprofit institution." *See* 72 F.3d at 924, 926-27. On appeal, the First Circuit held that the credit union should be considered a "government unit" for purposes of the statute. 72 F.3d at 938.

The discreet holding in *Delbonis* does not indicate that even a federal credit union would be deemed a government actor for Constitutional purposes, let alone implicate Freddie Mac. To the contrary, *Delbonis* itself found that a statutory determination regarding "governmental" status is necessarily limited to the application of the particular statute at issue. *See* 72 F.3d at 935 (holding that the Court's own determination in a prior case that a federal credit union was not a government agency under another statute was irrelevant in determining a credit union's status under the Bankruptcy Code), (*discussing Northeast Fed. Credit Union v. Neves*, 837 F.2d 531 (1st Cir. 1988)).

Delbonis is all the more inapposite to the *ABM/TMNI* decisions in light of the First Circuit's reliance upon the legislative history and purpose of the particular bankruptcy exception -- items which are clearly irrelevant to the Constitutional question decided by the Ninth Circuit below. *See* 72 F.3d at 930-31, 935-38 (finding that Congress intended the "government unit" exception to be broadly construed and that bringing a federal credit union within the ambit of the statute would further the Congressional purpose underlying the exception).

Moreover, as the Supreme Court held in *Lebron*, while Congressional declarations of status may affect the application of a particular statute, the court, not the legislature, must decide if the Constitution should apply: "[I]t is not for Congress to make the final determination of [an entity's] status as a government entity for purposes of determining . . . constitutional rights . . .." 115 S. Ct. at 971.

In any event, even if the *Delbonis* analysis were somehow relevant to the Ninth Circuit's decision in this case, Freddie Mac does not share the attributes of federal credit unions which led the First Circuit to conclude that they could be "government units" under the Bankruptcy Code. As the Court noted, federal credit unions are exempt from federal

income taxation under the provisions of 501(c)(1)(A) of the Internal Revenue Code, serve as "fiscal agents of the United States and depositories for public monies," and have "internal characteristics, such as limitations on membership and location [which], distinguish federal credit unions from proprietary institutions such as banks," who "may do business wherever and with whomever they wish." *Id.* at 932-33. Likewise, the First Circuit found significant that credit unions are subject to extensive federal regulation of their day-to-day activities through the National Credit Union Administration ("NCUA"), which promulgates its regulations pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1996), and even issues rulings like an executive branch agency. *See* 72 F.3d at 934 (noting that NCUA regulations govern membership, governance, chartering, credit practices, dissemination of program information, and payment of dividends).

Freddie Mac possesses none of the foregoing characteristics. Freddie Mac enjoys no federal income tax exemption, does not operate as a fiscal agent or depository for the United States, and its business activities are not subject to APA regulations or rulings. Rather, like a bank, Freddie Mac is a privately owned "proprietary institution" whose business is not circumscribed to limited membership or location requirements, and the *Delbonis* factors do not apply. *Cf.* 72 F.3d at 931 (federal credit unions found to be closely tied to the federal government based on their federal tax exemption and regulation under the NCUA.)

Petitioners wrongly assert that *Delbonis* found federal credit unions to be "government entities, in spite of the fact that no members of their boards of directors are appointed by the Federal government, on the basis that they are extensively regulated by the Federal government." *See* Petition at 26, 29. Petitioners are incorrect. Nowhere does *Delbonis* address whether the members of the board of directors of a federal credit union are government appointees, or even state that a credit union has such a governing body. In addition, as noted

above, even if Petitioners' characterization of the holding in *Delbonis* were accurate (which it is not),[10] the legislative designation applied to a credit union under the Bankruptcy Code is utterly inapposite to Freddie Mac's status for purposes of Constitutional application.

Petitioners also suggest that *Delbonis* "cit[ed] to this Court's opinion in *Lebron*" for the proposition that regulation alone can convert an entity into a government actor. *See* Petition at 26. Notwithstanding Petitioners' facile attempt to mislead the Court, nowhere in the lengthy quotation from *Delbonis* set out in ostensible support of their argument is *Lebron* even mentioned. *See* Petition at 26-29.[11] Likewise, nowhere in the cited text (or anywhere else) does *Delbonis* suggest that regulation of a credit union or any of its other characteristics render it a part of the government for Constitutional purposes; rather, as discussed above, the Court's analysis is limited to a discreet question of statutory interpretation.[12]

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[10] As discussed *supra*, the Court's conclusion that the credit union could be construed as a "government unit" for purposes of the Bankruptcy Code was not premised upon the mere presence of regulations affecting it, but rather upon legislative intent and the history of the statute and the full scope of the credit union's obligations and characteristics. Moreover, the credit union's status as a regulated entity was significant, not simply because it was regulated, but because the regulations controlled many aspects of its day-to-day operations and because its regulating authority, the NCUA, was akin to a government agency in issuing formal regulations and decisions under the APA which governed credit union operations. *See* 72 F.3d at 930-37.

[11] While *Delbonis* does cite to *Lebron*, neither of the two references stand for the proposition put forth by Petitioners. *See* 72 F.3d at 930 (finding that cases involving important "governmental" issues may be addressed on appeal even if not raised below); *Id.* at 933 (noting that a Congressional declaration of an entity's status is not dispositive of its governmental character).

[12] Given the express authority to the contrary, Petitioners cannot seriously contend that the existence of federal regulations is dispositive of an entity's character for Constitutional purposes. Moreover, under Petitioners' argument, not only all federal credit unions, but all federal savings

Delbonis thus bears no relationship to, and certainly creates no conflict with, the Ninth Circuit decisions in *ABM/TMNI*.[13]

CONCLUSION

As demonstrated above, the Ninth Circuit properly stated and applied *Lebron* and no conflict exists between the Circuits. Accordingly, the Petition for certiorari should be denied.

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and loans and all other federally regulated entities automatically would become government actors for Constitutional purposes. *See Delbonis*, 72 F.3d at 935 (noting that the Court had previously found savings and loans to be "federal instrumentalities" based on their federal charter and regulation); *see also Blum*, 419 U.S. at 351 n. 7 ("if the mere existence of this regulatory scheme made [the utility's] action that of the State, then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania.").

[13] Petitioners seem to contend that the *ABM/TMNI* decisions are at odds with an earlier Ninth Circuit decision in *Geneva Towers Tenants Org. v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974). This is not the case. As the Court below recognized, *Geneva Towers* is inapposite to Freddie Mac's termination actions. Indeed, the issue was fully briefed below and the Court was clearly aware of its own *Geneva Towers* decision at the time it determined that Freddie Mac was not a government actor. *See American Bankers*, 75 F.3d at 1409 (*citing Geneva Towers*, 504 F.2d at 487).